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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

McMILLIN COMPANIES, LLC,

Plaintiffs and Respondents,

v.

AMERICAN SAFETY INDEMNITY  
COMPANY,

Defendant and Respondent.

D065298

(Super. Ct. No. 37-2009-00083837-  
CU-IC-CTL)

APPEAL from an order of the Superior Court of San Diego County, Judith F. Hayes, Judge. Appeal dismissed.

Wilson, Elser, Moskowitz, Edelman & Dicker, Gregory D. Hagen and John R. Clifford for Defendant and Appellant.

Law Offices of Greg J. Ryan, Greg J. Ryan and Debbie H. Kim for Plaintiffs and Respondents.

Defendant American Safety Indemnity Company (ASIC) appeals from a postjudgment order of the superior court granting a motion to strike ASIC's memorandum

of costs ("Order"). The judgment that preceded ASIC's memorandum is the subject of another appeal in this court, decided this same date, *McMillin Cos., LLC v. American Safety Indemnity Co.*, No. D063586 (D063586). In D063586, we reversed the judgment.

An order denying costs "falls with a reversal of the judgment on which it is based." ( *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284.) That is because costs on appeal "are merely incidental to the judgment appealed from." ( *Purdy v. Johnson* (1929) 100 Cal.App. 416, 420-421.) Indeed, in its opening brief, ASIC acknowledges that its right to obtain costs may be impacted by the disposition of D063586.

Accordingly, ASIC's appeal from the Order is moot and must be dismissed. ( *Evans v. Southern Pacific Transportation Co.* (1989) 213 Cal.App.3d 1378, 1388.)

#### DISPOSITION

The appeal is dismissed. In the interests of justice, the parties will bear their respective costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

IRION, J.

WE CONCUR:

NARES, Acting P. J.

AARON, J.